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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND
TITLE & TRUST COMPANY OF FLORIDA,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

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Jacksonville 7, Florida

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ARGUMENT

The Brief for the United States in opposition to our Petition for Certiorari falls so far short of the mark that we deem it wise to file this Reply Brief. Furthermore, we have discovered the pendency in this Court of related cases, which we feel should be called to the attention of the Court.

The Petition for Certiorari makes these points with regard to the decision of the Circuit Court of Appeals, a review of which is sought: (1) The case involves the securing of the National Rights. (2) The decision below, as regards the consideration of the partnership obligation, went beyond the record and, without the aid of briefs or argument, contravened a decision of this Court, as well as (3) a decision of the same Circuit Court of Appeals. (4) As regarded rules of construction of contracts, the decision is in conflict both with decisions of this Court and of the Supreme Court of Florida. (5) The action of the Circuit Court of Appeals calls for the exercise of this Court's power of supervision. (6) In failing to apply State Statutes and State Decisional Law, the Circuit Court of Appeals has acted unconstitutionally.

We think we are correct in saying that the Government's Brief in Opposition completely ignores points (1), (2), (3), (5) and (6), and treats our Petition as though it raised only (4).

The matters reaching this Court have a tendency to sustain us in our contention that the case involves the securing of the National Rights, in the sense that it involves unjust interference by the tax collection procedure with the business of the Nation, thus involving the people of the Nation as distinguished from the Government itself. There are now pending before this Court the following Petitions for Certiorari which involve similar cases demonstrating the interference which we assert exists: No. 132, Aquilino vs. United States; No. 215, Goldstein vs. United States; and No. 300, United States vs. Hulley.

Aquilino and *Hulley* involve rights of lien claimants under State mechanics' and materialmen's liens, where the tax collecting authorities seek to obtain for the United States priority

over the lien claimants against monies receivable by the taxpayer, which could never have come into existence without the service of the lien claimants, who, in reality, created the fund in litigation by their services or materials. In these cases, the taxpayer could never have been entitled to the receivable free of the claims of the lien claimants, yet the United States seeks to place itself in better position as regards these lien claimants than the taxpayer itself could have been.

In *Goldstein*, there is involved the question whether the United States can take an asset of the taxpayer produced by the services of an attorney in priority to the attorney's right to compensation. As we understand the Goldstein record, the tax collection authorities very sensibly told Mr. Goldstein to go ahead with his services in the condemnation case against the taxpayer to produce and realize upon an asset for the taxpayer, indicating that they would not interfere with his right to compensation. This seemed most sensible, as there would be no fund out of which to collect the tax unless the attorney proceeded, or unless the United States Attorney intervened and represented the taxpayer in the condemnation-- in which event this Court can very well imagine the danger of an inadequate condemnation award-- so he was told to proceed and told that the Government would not seek priority over him, and yet, when his services were complete and he sought to realize on same, the Government successfully contended that it had a prior right to the funds. *Goldstein* alone would seem to justify Mr. Plumb's mention of the strong tendency to "rob Peter to pay Paul's taxes".

We feel justified in asserting that the causes pending in this Court show an undue zealousness for the Federal revenue, morally unjustifiable, economically unsound and legally unjust.

Although, without strict pertinency to our position here, but because they relate indirectly to this portion of our argument, we cite to the Court the cases of *U. S. v. Durham Lumber Co.* (4th Circuit, No. 7619, July 18, 1958, not yet reported in Federal Reporter) and *Aetna Casualty & Surety Co. vs. U. S.*, 4 N. Y. 2d 639, both of which were decided against the Government, and, so far as we know, neither of which has been brought to this Court. These cases seem to lie within the range of *Aquilino* and *Hulley*. On the sidelines, one wonders why the Government filed a Petition in *Hulley* which cites neither *Aetna* nor *Durham Lumber*. While wondering, one wonders why the Government suggests reversal in *Hulley* "without oral argument or further briefs".

Since the United States, by the wave of the Solicitor General's hand, ignores so completely our contention of the existence of a departure from the record, with the result of undue protection of the Federal revenue, we now wish to bolster our previous position by pointing to the Appellant's Statement of Points to be relied upon in its appeal in this case, as filed in the District Court in connection with the Government's appeal to the Circuit Court of Appeals, which points appear at R. 109 and 110. Point 2 was that:

> "2. The District Court erred in admitting parol evidence to show that (the) mortgage ... was ... intended to secure the individuals obligations of C. Albert Kimbel ..."

We asserted in the Petition that the Circuit Court of Appeals took it upon itself to go beyond the record and to decide that the partnership and endorser obligations were not the liabilities of Kimbel "in an individual and personal capacity". The decision below contains the following language:

"The obligations represented by the note of Duval Electric Co. and Thompson were owed to the Bank by C. Albert Kimbel only as a partner or as an endorser. They were not his liabilities in an individual and personal capacity. In construing the Florida statutes, where the context will permit, 'The word 'person' includes • • • partnerships • • •.' F.S.A. Sec. 1.01(3). It is unnecessary for our decision here that we determine whether a partnership is a true legal entity. See 40 Am. Jur. 137, Partnership Sec. 18. The Supreme Court has said, 'The partnership is a distinct thing from the partners themselves and it would seem that debts of the firm are different in character from other joint debts of the partners.' *Forsyth v. Woods*, 78 U. S. (11 Wall.) 484, 20 L. Ed. 207. So, a fortiori, debts of a partnership differ in character from the debts of a husband and wife or either of them. . . .

"We conclude that it was not the intent of the parties to regard the obligations of a partnership of which the husband was a member as obligations 'due to the mortgagee from the mortgagors.' If it was intended that the mortgage should secure the obligations of the partnership and the liabilities of C. Albert Kimbel as an endorser, language different from that which was used was required to declare such intent. . . ."

Pet. 36, 37 and 38.

We submit that it is crystal clear that the Circuit Court of Appeals distinguished between a man's obligation as a partner or endorser on the one hand, and other types of individual liabilities on the other hand. We know it to be true that the United States never asserted the existence of any such difference. We know by virtue of the following authorities

that Kimbel owed the past due partnership obligation and the endorser obligation on the past due note, as much as he owed his electric light bill or any other personal obligation. We assert that the following authorities demonstrate that we are correct, and we add that these authorities were timely called to the attention of the Circuit Court of Appeals and ignored:

Francis v. McNeal, 228 U. S. 695;

Underwood v. United States, 118 F. 2d 760;

Sec. 674.20 F. S. A.;

Sec. 674.68 F. S. A.;

and see other authorities in Petition and in our Brief on Petition for Rehearing in the Circuit Court of Appeals.

The Statutes mentioned were definitive of the obligation of Kimbel on the Note in question, yet were completely ignored. This, we insist, was failure to follow State law.

Since these State Statutes were ignored, we feel confident in our assertion that the Circuit Court of Appeals proceeded unconstitutionally within the meaning of *Erie R. Co. v. Tompkins*, 304 U. S. 64.

We must again point out that it is a surplus over which the parties are litigating, which surplus would be consumed by application to the partnership Note of February 15, 1953, rendering unnecessary any consideration of the other Notes. This partnership note is item (1) on page 5 of the Government's Brief. No adversion to the obligations enumerated

(2) and (3) on that page is necessary, if Petitioner is right concerning said first obligation.

In the case at bar, there should be no serious question but what due process of law has been denied to the Petitioner. The greatest essential of due process is the right to be heard. We were never heard on this supposed crucial distinction made by the Circuit Court of Appeals between one's "individual obligations", as a group of obligations distinct from one's obligations on past due endorsed notes and past due partnership notes, and the Government's Brief fails to acknowledge that such a distinction was made. In fact, again we find the wave of the hand on page 5 of the Government's Brief thus:

> "The District Court held that these individual obligations of the taxpayer to the bank were secured by the mortgage, holding the 'dragnet clause' to be ambiguous and therefore permitting parol evidence to aid in the construction of the instrument. (R. 102-104.)
>
> "The Court of Appeals, disagreed, construing the 'dragnet clause' as not covering the individual obligations of the taxpayer arising out of his actions as a partner (Pet. 35-38) or out of his action as an endorser of the corporation's notes (Pet. 38). Finding no ambiguity in the language, it did not consider extrinsic evidence of ascertain its meaning. (Pet. 39)"

The Court of Appeals did not disagree. It *distinguished* between "individual obligations" and "individual obligations ... as ... partner or ... endorser" -- a distinction not made by the District Court, counsel for the Government or either of the other parties, neither briefed nor argued.

When the State Statutes governing Kimbel's liability on this

first Note was called to the attention of the Circuit Court of Appeals by Petition for Rehearing, it ignored them and thereby proceeded unconstitutionally.

To have the matter readily before the Court, we call to the attention of the Court the fact that Section 674.68 F.S.A. (Pet. 17) defines the engagement of the endorser as that, on presentment of the Note

> "It shall be .... paid ... and ... if it be dishonered ... he will pay the amount thereof ...".

At the time of the execution of the mortgage in question, this Note was already past due, and the endorser's liability was, therefore, primary. And then there is the provision of Section 674.20 F.S.A. (Pet. 16) that

> ... one who signs in a trade ... name will be liable ... as if he had signed in his own name".

Duval Electric Co. was a partnership tradename, as was ruled by the same Circuit Court of Appeals in *Underwood v. United States*, 118 F. 2d 760, where the language was used:

> "Hanover Refining Company (a partnership) was merely a trade-name .... The partners were liable individually for any debts contracted in the name of the Company ..." (Bracket supplied)

Last, but not least, we call attention to a most important tactic adopted by the Solicitor General's office: They fail to file in this Court a Cross-Petition as regards the decision of the Circuit Court of Appeals to the effect that the Government lien against the husband is not a lien upon the estate by the entireties held by husband and wife, yet, at page 8, they

say that that point which they unsuccessfully urged below, should be a reason for denying certiorari. In this manner the Government seemingly shows a reluctance to face the tenancy by the entirety issue squarely, and apparently hopes to be able later to contend that this point is still open to it and, a favorable view toward the Government could exist by reason of denial of certiorari herein, if it be denied. The record clearly demonstrates that Title & Trust Company of Florida is the one party in this case interested, in opposition to the Government, in this phase of the case. Petitioner was insured by Title & Trust Company of Florida against there being any liens prior in dignity to that securing Petitioner in its primary obligation. If denial of certiorari were based upon that point, Petitioner would be made whole by Title & Trust Company of Florida. If denial of certiorari were upon that ground, and the ground were not expressed, Petitioner, with no possibility of redress, would lose the benefit of the title insurance policy it holds. And, be it here noted, the Government does not see fit to apprise this Court of the reasoning back of its contention that certiorari should be denied upon this particular ground, whereas heretofore the subject-matter of this ground has been the Government's motivation for appellate proceedings. This Petitioner has not heretofore briefed or argued and should not now be compelled to brief or argue this point, particularly since we would have to take the initiative, the Government not even having seen fit to argue in support of the point. To combat this last point, we are requesting the Clerk of the Circuit Court of Appeals to furnish us for filing with the Record heretofore filed, nine copies of the Brief of Title & Trust Company of Florida in the Circuit Court of Appeals.

In summary, it seems to us that the decision of *Erie R. Co. v. Tompkins*, newly applied to this field by *Commissioner v. Stern* and *United States v. Bess*, requires a sweeping review

of the decisions of this and other lower Federal Courts in the field of priority of Federal Tax Liens and that the case at bar and related cases of *Aquilino, Goldstein* and *Hulley* not only afford the opportunity of such review, but require same, especially when this Court realizes the impact which *Commissioner v. Stern* and *United States v. Bess* are having, as illustrated by such cases as *Durham Lumber* and *Aetna*. Further to demonstrate the necessity for such sweeping review, we call to the Court's attention the fact that most of the cases which have created the serious impingement on business have been the per curiam decisions. In one of the few cases where this Court has permitted briefs on the merits and oral argument, even before *Commissioner v. Stern*, there were four dissents in *United States v. Ball*. These four dissents clearly demonstrate doubt as to the correctness of the principles applied in the earlier cases even assuming it is a Federal question and not a question of State property law as indicated by *Commissioner v. Stern* and *United States v. Bess*.

We submit that our Petition for Certiorari should be granted.

Respectfully submitted,

W. GREGORY SMITH,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Brief has been made on each of the following parties in the manner indicated:

On the:

Solicitor General,
Department of Justice,
Washington 25,
D.C.;

by mailing same to him with air mail postage prepaid, addressed as above.

On the United States Attorney for the Southern District of Florida, and on Ray W. Richardson, Jr., Attorney for Respondent, Title & Trust Company of Florida, by delivery, at the office of counsel, to counsel or a Clerk therein.

W. GREGORY SMITH,
Attorney for Petitioner.